KHARI BIN MOHMED & ANOR

v.

SANIP BIN SALLEH & ANOR.

HIGH COURT MALAYA, TEMERLOH
TUAN LOW HOP BING J
[CIVIL APPEAL NO. 12-10-95]
18 JANUARY 1996

CIVIL PROCEDURE: *Summary judgment - Order 26A Subordinate Courts Rules 1980 - Cause of action arose out of negligence in motor vehicle road accident - Plea of contributory negligence by defendants - Whether by itself raising a prima facie defence on the merits - Whether constituted a substantial defence - Application for summary judgment thereof - Whether wholly inappropriate.*

The plaintiff, having filed a claim against the defendants for negligence in respect of a motor vehicle road accident, applied for summary judgment pursuant to s. 26A of Subordinate Courts Rules 1980. Upon the absence of Counsel for the defendant at the hearing thereof, a judgment in default was entered against the defendants. The defendants thereupon applied to set aside the judgment, and the learned Sessions Judge, upon consideration *inter alia* of the affidavit of Dato' R. K. Nathan at the Bar, set the judgment aside.

In this appeal, the plaintiff sought to challenge the Sessions Judge's decision arguing that the order to set aside was wrongly made as Dato' R.K. Nathan was not competent to affirm the aforesaid affidavit. The facts also showed that the defendants, in their statement of defence, had *inter alia* raised a plea of contributory negligence. That being the case, a further question arose as to whether such plea, in itself, could constitute a *prima facie* defence on the merits.

Held:

[1] The only person who could possibly refer to the conversation and as to what transpired from the communication between the plaintiff's solicitor and Dato' R.K. Nathan at the Bar would be Dato' R.K.Nathan himself. Hence Dato' R.K. Nathan was competent to affirm the affidavit with regard to the aforesaid communication between solicitors. His affidavit can and should be taken into consideration in the application to set aside the judgment in default obtained against the defendants.

[2] The decisive factor in all cases of setting aside a judgment in default is whether there is evidence before the Court disclosing *prima facie* defence. A plea of contributory negligence was raised in the defendant's statement of defence and the plea in itself is *prima facie* defence on the merits.

[3] The plaintiff's mode of action by way of summary judgment in respect of a cause of action based on negligence arising out of a motor vehicle accident is wrong and wholly inappropriate. It is clear that in order for the plaintiff's claim to succeed there must be proof of the defendant's negligence, and this proof can only come about by way of testimony of witnesses and not by way of summary judgment.

[Appeal dismissed. Decision of Sessions Judge allowing defendant's application to set aside affirmed]

Cases referred to:
Burns v. Kondal [1971] Lloyds LR 554 ***(foll)***
Govindoo v. Leong Kong Wing [1966] 1 MLJ 154 ***(foll)***
Ng Chu Sai v. Marimon bt Ali [1993] 1 MLJ 110 ***(refd)***
Sundharan a/l Ramasamy & Anor. v. Loo Soon Moh @ Loo Koon Lay & Anor. [1994] 3 CLJ 385 ***(refd)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 26A

Other sources referred to:
Halsbury's Law of England, Vol. 15, 3rd Edn., p. 260

For the applicant - Vadiveloo; M/s. Veloo & Co.
For the respondent - Suresh; M/s. R K Nathan & Co.

JUDGMENT

This is an appeal by the plaintiff against the decision of the Sessions Court Judge in allowing the defendants' application to set aside judgment in default which was obtained on 23 May 1995.

The cause of this action arose out of negligence in a motor vehicle road accident. Plaintiffs' solicitors filed an application for summary judgment under O. 26A of the Rules of Subordinate Courts 1980. The plaintiffs' application for summary judgment was fixed for hearing on 23 May 1995, when the plaintiffs obtained judgment in default against the defendants.

The defendants then filed an application dated 6 June 1995 to set aside the judgment in default and the affidavit in support there was affirmed by Dato' R.K. Nathan at the Bar. The affidavit related to the absence of Counsel on the 23 May 1995 and the obtaining of judgment in default, pursuant to a communication between the plaintiffs' solicitor Mr. Vadiveloo and Dato' R.K. Nathan at the Bar.

The only person who could possibly refer to the coversation and as to what transpired from that communication would be Dato' R.K. Nathan at the bar. Hence Dato' R.K. Nathan was certainly competent to affirm the affidavit with regard to the aforesaid communication between solicitors. His affidavit can and

should be taken into consideration in the application to set aside the judgment in default obtained against the defendants. The decisive factor in all cases of setting aside a judgment in default is whether there is evidence before the Court disclosing a *prima facie* defence. A plea of contributory negligence was raised in the defendants' statement of defence and the plea in itself is *prima facie* defence on the merits: *Burns v. Kondal* [1971] Lloyds LR 554.

In *Govindoo v. Leong Kong Wing* [1966] 1 MLJ 154 at page 155 C (left), it was held that contributory negligence is a substantial defence. The onus of proof rests on the plaintiff to prove his case by adducing evidence to show that there has been a breach of a general or specific duty by the defendants: per Hashim Yeop A. Sani, J (as he then was) said in *Ng Chu Sai v. Marimon bt Ali* [1993] 1 MLJ 110 para I (right) and page 111 para A (left).

In addition to the affidavit disclosing *prima facie* defence on the merits, in this appeal, I am of the considered view that the plaintiffs' mode of action by way of summary judgment in respect of a cause of action based on negligence arising out a motor vehicle accident is wrong and wholly inappropriate.

It has been stated that the plaintiff cannot succeed without proof of the defendants' negligence. "Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry. Evidence, if accepted and believed, may result in proof, but it is not necessarily proof of itself." (See Halsbury's Laws of England, Vol. 15, 3rd Ed. at page 260). This was quoted with approval in *Sundharan a/l Ramasamy & Anor. v. Loo Soon Moh & Loo Koon Lay & Anor.* [1994] 3 CLJ 385 at 386 para E (left) and para H (right) and page 387 para C-D (left).

It is clear that in order for the plaintiffs' claim to suceed, there must be proof of the defendants' negligence and this proof can only come about by way of testimony of witnesses and not by way of summary judgment.

In the circumstances, I hold that the learned Sessions Court Judge was correct in allowing the defendants' application to set aside the default judgment obtained by the plaintiffs. I therefore dismiss this appeal with costs.

Reported by W.A. Sharif